

lead to a suspicion of a discharge. There was not even an attempt to comply with the requirements of Section 13267(b) and on this basis alone, the Order must be stricken.

B. Wetlands Habitat.

“Functions & Values

Due to their high levels of nutrients, freshwater marshes are one of the most productive ecosystems on earth. They can sustain a vast array of plant communities that in turn support a wide variety of wildlife within this vital wetland ecosystem. As a result, marshes sustain a diversity of life that is way out of proportion with its size. In addition to their considerable habitat value, non-tidal marshes serve to mitigate flood damage and filter excess nutrients from surface runoff.”

Statement taken from the Environmental Protection Agency
Website March 12, 2009

(<http://www.epa.gov/owow/wetlands/types/marsh.html#non-tidal>)

As stated above, Wildon has spent enormous time, energy and money enhancing and creating wetlands habitat. The EPA recognizes that wetlands habitat can actually enhance the water quality by removing nutrients. Presumably this statement by the EPA is based upon “evidence” that is at least as good as that pointed to by the Regional Board and this conflicting evidence supports Wildon’s position that the Order should be rescinded.

C. Watershed Wide Testing.

The Order states “... you are hereby required to submit a proposed watershed-wide nutrient water quality monitoring plan to the Regional Water Board as soon as possible, but no later than June 30, 2009”. The use of the term “watershed wide” is absolutely ridiculous. No agency can arbitrarily order a private citizen under threat of criminal punishment to conduct tests on an area encompassing over seven hundred square miles at a potential cost of \$500,000 simply because that citizen owns property that is designated as agricultural. This is a clear abuse of discretion and contrary to public policy. And framing the order with the “opt in” provisions that allows Wildon to join the Western Riverside County Agriculture Coalition (WRCAC) does not validate the Regional Board’s actions. This is pure extortion. Under threat of criminal prosecution Wildon can spend \$5,126 and join WRCAC or else opt out and do the testing itself and spend \$500,000. There is no authority in this country that allows a government agency to force a citizen to spend vast amounts of money testing water on public and private property spread out across over seven hundred square miles without any evidence or even a specific allegation of wrongdoing. The public policy of this country is pretty clear that you remain innocent until proven guilty. There is also a well established public policy that the government cannot take a persons property without just compensation and this is exactly what this Order does. It requires Wildon to spend money for the public function of testing the waters of the entire watershed. This type of testing is a governmental function and not a function that can be imposed on an individual citizen under penalty of criminal prosecution unless that person was at

least suspected of polluting the entire watershed and that is not the case here. Ordering someone to test a discharge on their own property or even adjacent property once the Regional Board has established a person has violated the law is one thing, but to try and force a person to test the entire watershed is ludicrous and is a violation of public policy and an abuse of power and discretion.

As the court stated in *California v. Newhall*, 161 Cal.App.4th 1464, 1483 (2008). "The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal. App. 3d 368, 387 [146 Cal. Rptr. 892].) Here the Regional Board has acted completely arbitrary, capricious, without any evidence, contrary to public policy and its actions are procedurally unfair.

Water Code Section 13267(b)(1) states that the cost of furnishing the technical reports must bear a reasonable relationship to the need for the report and the benefits obtained from the report. There is absolutely no reasonable relationship between spending one half million dollars bears when compared to the benefits obtained, especially when there is not even any evidence that Wildon has discharged any pollution whatsoever. On the other hand, there is some evidence that the activities of Wildon may actually enhance the water quality of the water it uses. The problem here is that the statute was designed to force a known polluter to help clean up and monitor its own mess. This statutory authority granted to the Regional Board is being abused to extort funds from persons who have not discharged any "waste" into the basin and the Regional Board's action is unlawful and contrary to public policy.

D. The WRCAC Coalition.

The Regional Agency encourages the victims of their Orders to coordinate with WRCAC to either go through the exemption process or meet the Section 13267 Order requirements. (See February 23, 2009 letter from the Regional Board accompanying the Order attached hereto as Exhibit A).

The "exemption" process is a governmental function which has been delegated to WRCAC which has a clear conflict of interest. To be "exempt" the WRCAC must find you are not engaged in an "agricultural activity". Agricultural activities, according to the WRCAC include:

"irrigated ag, non-irrigated ag, vacant land zoned as agriculture, citrus, turf farms, wildlife reserve, orchards/vineyards, nurseries, Christmas tree farms, livestock other than dairy including poultry, horses and other backyard livestock". (See WRCAC Application for Exemption of Land Use).

Obviously it is in the best interest of WRCAC to find as many agriculture operators as possible to collect the fees. This is a clear conflict of interest because it is in the best interest of WRCAC to increase the number of participants to reduce the cost to those polluters actually responsible

for the pollution in Canyon Lake and Lake Elsinore. There are no published standards and no process governing the coalition to keep WRCAC from acting in a capricious and arbitrary manner. Furthermore, their use of the term "agricultural activity" includes activities far from the usual and customary meaning of "agricultural activities". The terms "vacant land zoned as agriculture" and "wildlife reserve" are rich examples of the categorized over-reaching of the WRCAC.

In *State Board v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436 (1953) 254 P.2d 29 the court discussed the dangers of entrusting the power to regulate to another: "In declaring invalid the Bituminous Coal Conservation Act of 1935, the United States Supreme Court stated: ". . . one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." (*Carter v. Carter Coal Co.*, 298 U.S. 238, 311 [56 S.Ct. 855, 80 L.Ed.1160])"; see also *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3^d 1, at 12.

In this matter the whole regulatory scheme implemented under the guise of Section 13267 is designed to compel an individual (Wildon) to seek the assistance of WCRAC by virtue of imposing on that individual the staggering cost of testing the entire water basin if they do not join the Coalition. It is the Coalition that determines whether an exemption applies, and the Coalition has a direct pecuniary benefit in making sure more individuals are brought into the coalition. This delegation of this type of decision making is simply not allowed.

IV. CONCLUSION

For the foregoing reasons, the Order must be rescinded and Wildon's attorneys fees paid by the Regional Board.

Dated: March 19, 2009

CLINTON L. BLAIN
Attorney for Wildon Associates, a California
Limited Partnership

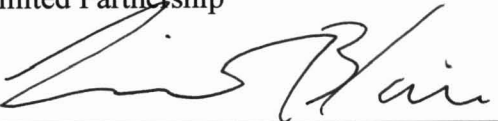


EXHIBIT A



California Regional Water Quality Control Board

Santa Ana Region



Linda S. Adams
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Environmental Protection

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Arnold Schwarzenegger
Governor

Date: February 23, 2009

To: Agricultural Operators

From: Gerard J. Thibeault
Executive Officer
California Regional Water Quality Control Board

Subject: **Rescission and Re-issuance of Water Code section 13267 Investigative Order**

Recently, we sent you a California Water Code section 13267 Investigative Order (Order) dated December 19, 2009¹, from the Santa Ana Regional Water Quality Control Board (Regional Water Board) requiring the submittal of a monitoring plan and schedule and submittal of an agricultural nutrient management plan. These requirements are intended to address nutrient discharges to Lake Elsinore and Canyon Lake.

Regional Water Board staff have determined that, due to mailing irregularities and some confusion regarding the process for an exemption from the Investigative Order, it is appropriate to rescind and re-issue the Order. Therefore, the December 19, 2009 Order is hereby rescinded and a revised Order is hereby re-issued, a copy of which is attached hereto.

Please note the following

- This re-issued 13267 Investigative Order contains the same requirements for submittals as the December 19, 2009 Order;
- The submittal due date is now **June 30, 2009**;

The Regional Water Board encourages you to coordinate with the Western Riverside County Agricultural Coalition (WRCAC) to either go through the exemption process or meet the 13267 Investigative Order requirements. In addition, Regional Water Board staff, in coordination with WRCAC, will conduct a public meeting to receive questions or comments about this Order, and the TMDLs in general. This meeting will be held at the following time and location. We recognize that this is a complex issue and we encourage your participation at the public meeting.

DATE: March 17, 2009
TIME: 1:00 PM
LOCATION: Eastern Municipal Water District
Board Room
2270 Trumble Road, Perris

Should you have any questions, please feel free to contact Hope Smythe at (951)782-4493 or by e-mail hsmythe@waterboards.ca.gov.

¹ The correct date should have been December 19, 2008.